Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

**October Term, 1978.**

No. 78-1095

VIJAY S. KUMAR,

*Petitioner,*

*against*

REBERTA INGRAM, as Administratrix of the goods, chattels and credits which were of WALTER INGRAM, deceased, and REBERTA INGRAM, individually,

*Respondent.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.**

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In The

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October Term, 1978.

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Vijay S. Kumar,

*Petitioner,*

*against*

Reberta Ingram, as Administratrix of the goods, chattels and credits which were of Walter Ingram, deceased, and Reberta Ingram, individually,

*Respondent.*

---

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.**

The petitioner, Vijay S. Kumar, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered on October 19, 1978, which unanimously affirmed the order of the United States District Court for the Western District of New York (1) denying petitioner's motions for dismissal and summary judgment against complainant, who first added petitioner as a party to this medical malpractice action and caused service to be made on petitioner after the statute of limitations had run; and (2) granting respondent's motion to amend the complaint retroactively to add petitioner's name.

## Opinions Below.

The opinion of the United States Court of Appeals for the Second Circuit (Appendix A) is not yet officially reported, but appeared in The New York Law Journal, October 31, 1978, p. 1 col. 6; the memorandum decision of the United States District Court for the Western District of New York (Appendix B) is not reported.

## Jurisdiction.

The order of the United States Court of Appeals for the Second Circuit was filed on October 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## Questions Presented.

1. Where the applicable statute of limitations in a diversity action has expired before service of process on or notice to a new party defendant has been effected, does Fed.R.Civ.P. 15(c) permit relation back of a subsequent amendment of the summons and complaint adding such new party so as to avoid the bar of the statute of limitations?

2. Where a diversity action has been filed naming one party and after the statute of limitations expires a different party who had no prior notice of the action is added and served, does the prior filing of the original complaint constitute a timely commencement of the action under Fed.R.Civ.P. 3 against the newly added party?



## Statutes and Rules Involved.

*Federal Rules of Civil Procedure*

Rule 3. Commencement of Action

> "A civil action is commenced by filing a complaint with the court."

Rule 15. Amended and Supplemental Pleadings

• • •

> "(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

## Statement of the Case.

Petitioner *Vijay S.* Kumar, a neurologist, rendered treatment to Walter Ingram between January 6-15, 1975 in Illinois. Ingram died and Dr. Kumar subsequently moved to New York. Ingram's administratrix, an Illinois resident who at all times could have commenced her action in Illinois pursuant to that State's long-arm statute, decided to sue Dr. Kumar in New York for malpractice.

Plaintiff's experienced attorneys ascertained that a Dr. *Vijaya N.* Kumar, an anesthesiologist, resided in Valhalla, New York. On December 28, 1976, just before expiration of the two-year statute of limitations, plaintiff filed suit in the United States District Court for the Southern District of New York on the basis of diversity jurisdiction under 28 U.S.C. §1332, captioning her summons and complaint against *Vijaya N.* Kumar.

Plaintiff's attorneys instructed the marshal to serve *Vijaya N.* Kumar at his home in Valhalla, N. Y. After such service was made, plaintiff learned that she had made a mistake; Dr. *Vijaya N.* Kumar of Valhalla, N. Y., the person whom plaintiff had named and sued, had never treated the decedent.

After further inquiry plaintiff ascertained that the neurologist *Vijay S.* Kumar (petitioner herein) resided in Jamestown, N. Y. On May 6, 1977, several months later and 121 days after the two-year statute of limitations (Ill. Smith-Hurd Annot. Stat. Ch. 83, §15) had expired, plaintiff caused the summons and complaint still erroneously naming *Vijaya N.* Kumar to be served on petitioner. On petitioner's motion to dismiss the action for improper venue, the action was transferred from the Southern to the Western District of New York.

Since plaintiff never named or served petitioner until a number of months after the statute of limitations expired, her claim should have been time-barred, and petitioner therefore moved for summary judgment. Plaintiff cross-moved under Fed.R.Civ.P. 15(c) to amend the caption of her complaint to name petitioner instead of Vijaya N. Kumar (34a). The district court denied petitioner's motion and granted plaintiff's cross-motion, treating the issue as one of merely correcting a misnomer.



The Court of Appeals for the Second Circuit recognized that this case involved more than a simple "misnomer," that it was in fact an amendment "changing the party against whom a claim is asserted" (Appx. A, p. 10a). Under Fed.R.Civ.P. 15(c) such an amendment can relate back to the date of the original pleading only if *"within the period provided by law for commencing the action against him,* the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." (Emphasis added.)

It is undisputed that petitioner never received notice of the institution of this action before the statute of limitations expired and that he "did not get notice until he was served in May 1976, several months after the statute of limitations had run" (see Appx. A, p. 10a). It is also undisputed that petitioner did not know and could not have known of the pending action or that, but for a mistake in identity, the action would have been brought against him. He had no reason to suspect that a lawsuit would be started against him.

Notwithstanding the undisputed failure to comply with the two express requirements of Rule 15(c) for relation back, the Court of Appeals affirmed the district court's order denying defendant's motion for summary judgment and permitting plaintiff to amend retroactively the caption so as to bring in a new party.

The court below interpreted the words of Rule 15(c) "within the period provided by law for commencing the action against him" to extend beyond expiration of the statute of limitations and to include an additional un-

defined time after filing the complaint in which to effect service of process. It did so under the interpretation of the rule for commencement of actions followed by the Second Circuit (see *Sylvestri* v. *Warner & Swasey Co.*, 398 F.2d 598 [2d Cir.]), but rejected by a majority of the Circuits.

Both courts below recognized the precedental significance of their decisions and the conflicting state of the federal decisional law in this area. The district court described the issues raised by this petition as a "law professor's dream" (Appx. B, p. 15a), while the Court of Appeals noted: "Whether a 'new' party may be added by amendment under Rule 15 after the statute has run is a subject on which much ink has been spilled by courts and commentators" with no definitive guidance from this Court on that issue (Appx. A, p. 7a).

## The Reasons for Granting the Writ.

**1. The decision below permitting relation back of an amendment adding a new party after the statute of limitations has run where no prior service on or notice to such party was ever effected conflicts with the rule in the other Circuits and raises an important question of Federal law which, to date, has not been, but should be, settled by this Court.**

The Second Circuit held below that Rule 15(c) allows amendment of a pleading to add a new party who was not served prior to the expiration of the statute of limitations to relate back to the filing of the original complaint. In so doing it laid down a rule directly in conflict with that followed by the other Federal Circuit Courts of Appeals that have ruled on this point (*Archuleta* v. *Duffy's Inc.*, 471 F.2d 33, 35-36 [10th Cir.]; *Simmons* v. *Fenton*, 480 F.2d 133, 137 [7th Cir.]; *Anderson v. Papillion*, 445



F.2d 841, 842 [5th Cir.]; *Marlowe v. Fisher Body*, 489 F.2d 1057, 1064 [6th Cir.]), all of which hold that Fed.R. Civ.P. 15(c) does *not* permit relation back of an amendment changing a party-defendant where the original complaint was never served on him and he had no notice thereof prior to expiration of the statute of limitations, and that:

> "Such amendment can relate back to the date the complaint was filed only if the provisions of Rule 15(c) are met" (*Archuleta* v. *Duffy's, Inc.*, 471 F.2d 33, 35 [10th Cir.]).

Hitherto the rule had always been "that the amendment changing a party's name will relate back where the party intended to be served, though misdescribed, was actually the party served" (*Simmons* v. *Fenton*, 480 F.2d 133, 137 [7th Cir.]), but not where a new party is added. As held in *Graves* v. *General Ins. Corp.*, 412 F.2d 583, 584-585 (10th Cir.):

> "Obviously, if appellant is to prevail he must show that a misnomer is involved in order to take advantage of the relation back doctrine incorporated in Rule 15(c). But this is not a true misnomer situation, or at least not the type of misnomer Rule 15(c) was envisioned to correct. What appellant actually accomplished by his Notice was to add or substitute a party.
>
> • • •
>
> "The addition or substitution of parties who had no notice of the original action is not allowed. [Citations omitted.] Substitution of a completely new defendant creates a new cause of action. Permitting such procedure would undermine the policy upon which the statute of limitations is based."

The Second Circuit correctly found that this case did not fit within the category of a "mere misnomer," and

concluded that it must be treated as an amendment "changing the party against whom a claim is asserted" (Appx. A, p. 10a). In nevertheless allowing relation back of the amendment to bring in a new party defendant four months after the statute had run, with no previous service of any kind on or notice to petitioner, it arrived at a conclusion directly in conflict with the explicit language of the rule and the holdings in other Federal Circuits on this point.

The court below incorrectly equated the provisions of Rule 15(c) with Fed.R.Civ.P. 3 (and with corollary state rules) governing commencement of an action, as applied to the running of the statute of limitations. Rule 3, governing commencement of an action by filing, has no requirement of notice of the existence of the action, whereas Rule 15(c) specifically requires timely notice of the existence of the action in order for the amendment to be permitted to relate back. As held by the Seventh Circuit in *Simmons* v. *Fenton*, 480 F.2d 133, 137:

> "The second sentence in Rule 15(c) was added by amendment in 1966, 383 U.S. 1029, 1044. This amendment has been the subject of our present consideration. • • • [S]tate statutes of limitations are frequently geared to the filing of a complaint. This appears to be so in Illinois. However, Rule 15(c) is geared to notice. The party to be substituted must receive *notice of the action* 'within the period provided by law for commencing the action against him.' • • • [I]t is apparent that Doris J. Fenton had no notice until after the statute of limitations had run. She could not have had notice that a suit had been filed against her until she heard about it." (Emphasis in original.)

The decision below conflicts with the clear language of the rule and with the decisions following it in most of the other Circuits. This type of conflict has regularly



been deemed by this Court sufficient reason to grant certiorari (*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 43-44). As noted by Stern & Gressman, Supreme Court Practice, pp. 264-65 (5th ed.):

> "The Supreme Court *usually* will grant certiorari where the decision of the federal court of appeals, as to which review is sought, is in direct conflict with a decision of another court of appeals on the same matter of *federal* law or on the same matter of *general* law as to which federal courts can exercise independent judgments. One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions on these matters among the federal courts of appeals. Hence a square and irreconcilable conflict of this nature *ordinarily* will be enough to secure review. See, e. g., *Avco Corp.* v. *Aero Lodge 735*, 390 U.S. 557, 559; *Northeastern National Bank v. United States*, 387 U.S. 213, 217." (Emphasis in original.)

The decision below permits the adding of a wholly new party, never previously named, served or notified of the pendency of the action within the period of the statute of limitations. "Permitting such procedure would undermine the policy upon which the statute of limitations is based" (*Graves* v. *General Ins. Corp.*, 412 F.2d 583, 585 [10th Cir.]), a salutary policy intended "to penalize claimants for sleeping on their rights" (*Matter of Estate of Feinberg*, 18 N.Y.2d 499, 507, 277 N.Y.S.2d 255) and to protect potential defendants against stale claims.

The Second Circuit's unique interpretation of Fed.R. Civ.P. 15(c) will necessarily have widespread repercussions; since timely commencement of an action is a constantly recurring issue in cases of all types, whether jurisdiction be by way of diversity or Federal question. Its conflict with the rule as written and followed by the Federal Courts of Appeals of the other Circuits will necessarily introduce uncertainty into the practice in the

Federal courts. Accordingly the issue is one calling for prompt settlement by this Court in the exercise of its supervisory jurisdiction over the practice in the Federal courts.

**2. The decision below is based on an interpretation of when an action is commenced for purposes of tolling the statute of limitations which conflicts with the rule followed in other Federal Circuits, where an opposite result would have been mandated.**

The courts below reached their result by applying the Second Circuit rule that "commencement" of a diversity action by filing under Rule 3 suffices to halt the applicable state statute of limitations (Appx. A, pp. 5a-6a; Appx. B, p. 20a). An opposite rule is followed in other Federal Circuits (*see Witherow* v. *Firestone Tire & Rubber Co.*, 530 F.2d 160, 166 [3d Cir.]; *Anderson* v. *Papillion*, 445 F.2d 841, 842 [5th Cir.]).

There exists no definitive ruling from this Court determining the issue. As a result, a claim which would be time-barred in the courts of one circuit is upheld in another circuit under the identical set of circumstances.

In the instant case this dichotomy of principles enabled the courts below to arrive at a result opposite to that which would have been mandated had this diversity action been commenced in the State courts of the forum or in another circuit.

New York provides a saving period limited to 60 days after delivery of the summons for service, provided that it is delivered to the sheriff of the county in which the intended defendant resides or works or last resided or worked (CPLR §203[5]). As the court below has recognized, the effect of that saving statute is limited to cases where the plaintiff is actually aware of *who* the defendant



is and in *which county* he resides or works, so that the summons is duly delivered to the sheriff of the proper county (*Kern v. Hettinger*, 303 F.2d 333, 338 [2d Cir.]).

Under no circumstances does New York consider delivery of the summons to the sheriff of the wrong county to be a commencement of the action sufficient to extend the statute of limitations (*Elliott* v. *Amy*, 297 N.Y. 622, 75 N.E.2d 633; *New York State Elec. & Gas Corp.* v. *Clair*, 23 A.D.2d 602, 256 N.Y.S.2d 361 [3d Dep't]; *Barko* v. *Mollica*, 5 A.D.2d 699, 169 N.Y.S.2d 771 [2d Dep't]; *Keating* v. *Quint*, 215 N.Y.S.2d 582 [S. Ct., Qns. Co.]). In any event, delivery to the sheriff would not extend the statute for more than 60 days after delivery (*Oliver* v. *Basle*, 55 A.D.2d 975, 390 N.Y.S.2d 466 [3d Dep't]).

Petitioner was not served until 121 days after the statute of limitations had expired and after the complaint was filed in the wrong district of New York against the wrong defendant.

So long as different Circuits follow different rules as to when an action is commenced for purposes of the statute of limitations, diverse results will continue to be reached on the same fact patterns. This issue can and should be settled by this Court, so that the various Courts of Appeals need no longer be called upon to resolve and re-resolve it for dissatisfied district court litigants looking to the law in other Federal jurisdictions, and so that the end result in an action should no longer depend upon the fortuitous circumstance of which court it is brought in.

## CONCLUSION.

**For the reasons stated herein the petition for a writ of certiorari should be granted.**

Dated: January 4, 1978.

THOMAS R. NEWMAN,
*Attorney for Petitioner.*

*Of Counsel:*
ROBERT M. COHEN,
CLIFFORD A. BARTLETT, Jr.



## APPENDIX A.

**Opinion of the Court of Appeals.**

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 44—August Term 1978.

Argued September 13, 1978 Decided October 19, 1978

Docket No. 78-7181

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REBERTA INGRAM, as Administratrix of the goods, chattels, and credits which were of Walter Ingram, deceased, and REBERTA INGRAM, individually,

*Plaintiff-Appellee,*

*against*

VIJAY S. KUMAR,

*Defendant-Appellant.*

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Before:

Feinberg, Mansfield, and Smith, Circuit Judges.

Appeal from order of United States District Court for the Western District of New York, John T. Curtin, Ch. J., denying defendant's motions for dismissal and summary judgment and granting plaintiff's motion to amend the complaint to correctly name the defendant.

Affirmed.

David Jaroslawicz, New York, N. Y. (Julien, Schlesinger & Finz, New York, N. Y., Alfred S. Julien, Stuart A. Schlesinger, of counsel), for Plaintiff-Appellee.

Thomas R. Newman, New York, N. Y. (Bower & Gardner, New York, N. Y., Barbara P. Billauer, of counsel), for Defendant-Appellant.

FEINBERG, Circuit Judge:

Defendant Vijay S. Kumar, a physician residing in Jamestown, New York, appeals from an order of the United States District Court for the Western District of New York, John T. Curtin, Ch. J., that denied Kumar's motion for summary judgment and granted the cross-motion of Reberta Ingram, a resident of Illinois, to correct the spelling of defendant's name in the complaint from Vijaya N. Kumar to Vijay S. Kumar. In this medical malpractice action, plaintiff sues on her own behalf and as administratrix of the estate of her husband, Walter Ingram, and alleges in various causes of action that defendant's negligent treatment of her husband in January 1975 inflicted pain and suffering upon him while alive, and caused his eventual death and her own loss of consortium. The basis of defendant's motion was that the action is barred by the applicable two-year statute of limitations. Although Judge Curtin denied the motion, he certified his order under 28 U.S.C. §1292(b), and a panel of this court granted leave to appeal. We affirm the order of the district court.

I

The relevant facts, for the purpose of this appeal, may be assumed to be as follows. Defendant Dr. Vijay S. Kumar, a neurosurgeon, treated plaintiff's decedent in Illinois from January 6 to January 13, 1975, and sometime thereafter moved to New York. On December 28,



1976, plaintiff commenced her action in the United States District Court for the Southern District of New York, by filing a summons and complaint with the Clerk of the court naming Vijaya N. Kumar as defendant. To locate defendant, plaintiff's counsel had consulted the New York State Medical Directory and found the name of Vijaya N. Kumar, a physician in Valhalla, New York, and thus believed this to be the proper spelling of defendant's name. When service of process was attempted on Vijaya N. Kumar, it was learned that this doctor had never treated plaintiff's decedent. Later investigation revealed a Dr. Vijay S. Kumar, residing in Jamestown, New York, who was served with the original complaint on May 6, 1977. On defendant's motion to dismiss the action for improper venue—Valhalla is in the Southern District, Jamestown in the Western—the action was transferred to the latter district. Defendant then filed an answer raising no affirmative defense, but two days later amended the answer to plead the statute of limitations. Defendant then moved for summary judgment and also to dismiss under Fed.R.Civ.Proc. 41(b) for plaintiff's alleged failure to prosecute, because plaintiff had not yet served a complaint upon defendant designating Vijay S. Kumar as defendant. Plaintiff then cross-moved under Fed.R. Civ.Proc. 15 to amend her complaint to change defendant's name therein from Vijaya N. Kumar to Vijay S. Kumar.

The motions were argued before Judge Curtin, who ruled in favor of plaintiff in a nine-page, unreported memorandum opinion. On defendant's claim that plaintiff had failed to exercise due diligence in serving him, the judge exercised his discretion under Rule 41(b) and denied the motion to dismiss. With regard to defendant's motion for summary judgment based on the statute of limitations and plaintiff's cross-motion under Rule 15, the judge viewed plaintiff's motion "as one to correct a misnomer [rather] than as one to substitute parties." The

judge granted plaintiff's motion and held that the amendment related back to the date on which the complaint was filed in December 1976. Under *Sylvestri v. Warner & Swasey Co.*, 398 F.2d 598 (2d Cir. 1968), the action therefore was not barred even though service on defendant was made after the two-year statutory period, and defendant's motion was denied.

II

The questions thus posed seem deceptively simple, but the statement of at least 10 issues in appellant's brief on appeal and the plethora of cases wrestling with "relation back" amendments under Rule 15(c) suggest that a close look at the district court's action is warranted. The main attack on appeal is on our decision in *Sylvestri v. Warner & Swasey Co., supra,* written by then Chief Judge Lumbard and joined in by one member of this panel. In that case, we held that merely filing a complaint with the district court in a diversity action commences the action for the purpose of the statute of limitations even though under the law of the state in which the district court is located, only service of process upon the defendant could achieve that result. The opinion contained a lengthy analysis of the effect of *Hanna v. Plumer,* 380 U.S. 460 (1965) on *Ragan v. Merchants Transfer & Warehouse Co.,* 337 U.S. 530 (1949) and concluded that "Rule 3, Fed.R.Civ.P. is the proper measure of the commencement of [the] action for purposes of the statute of limitations . . . ."[1] *Id.* at 606. Appellant claims that the deci-

[1]Rule 3 provides:

> A civil action is commenced by filing a complaint with the court.



sion in *Sylvestri* is inapplicable and that even if it does apply, it should be overruled as unconstitutional or unwise.

As a basis for distinction, appellant points out that in *Sylvestri,* the New York resident was the plaintiff, while here it is the defendant. We do not regard this distinction as significant. Defendant also emphasizes that the panel in *Sylvestri* noted that, unlike the situation here, "the defendant had actual notice of the action long before the three year [limitations] period under the New York statute expired." 398 F.2d at 606. This observation, however, was made in the context of a discussion of the plaintiff's duty under Fed.R.Civ.Proc. 4(a) to use due diligence in serving process upon a defendant after filing a complaint.

Asserting that *Sylvestri* represents a minority view in the federal courts,[2] appellant also vigorously urges us to overrule that decision primarily because it encourages forum shopping. This panel, of course, is bound by *Sylvestri* and cannot properly overrule it except by rehearing *en banc.* Moreover, our acceptance of its binding force is not grudging; we think the decision was correct

[2]The circuits are split on the issue. Compare *Witherow* v. *Firestone Tire & Rubber Co.*, 530 F.2d 160, 166 n. 8 (3d Cir. 1976) and *Anderson* v. *Papillion*, 445 F.2d 841 (5th Cir. 1971) with *Smith* v. *Peters*, 482 F.2d 799 (6th Cir. 1973), cert. denied, 415 U.S. 989 (1974) and *Chappell* v. *Rouch*, 448 F.2d 446 (10th Cir. 1971).

for the reasons there given.[3] Finally, appellant claims that the *Sylvestri* doctrine denies him due process and the equal protection of the laws. We note that a substantial number of states provide that the statute of limitations is tolled when the action is filed rather than when service is made on a defendant.[4] This includes Illinois, where defendant committed his allegedly negligent acts. See Ill. Ann. Stat. ch. 110, §13; ch. 70, §2 (Smith-Hurd); *Jackson v. Navik*, 308 N.E.2d 143, 145, (Ill. App. 1974). Even in New York, as indicated in the quotation from *Sylvestri* in note 3 above, the statute of limitations may be tolled for 60 days by filing the summons and complaint with the Sheriff or with the County Clerk within the City of New York. New York Civ.Prac.Law §203 (b) (5) (McKinney Cum. Supp. 1977-78). We can find no case in which the constitutionality of these provisions has been seriously challenged, and we hold the claim of unconstitutionality to be without merit.

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[3] E.g., we stated at 398 F.2d 606:

> Application of Rule 3 definitely will not result in forum-shopping. A party first deciding to assert a claim after the expiration of the period prescribed by the New York statute of limitation will be precluded from doing so under the federal rule. On the other hand, one who is preparing to sue before the expiration of the statutory period will gain scant advantage from bringing the action in the federal court, particularly in view of the additional sixty day grace period afforded by the New York statute. . . .

For favorable comment on the result in *Sylvestri*, see, e.g., 2 Moore's Federal Practice ¶3.07 [4. 3-1a], at 3-101, 3-111 to -113 (1978); Comment, Commencement of a Diversity Action for Statute of Limitations Purposes, 37 Mo. L. Rev. 734 (1971).

[4] See collection of cases in 27 A.L.R.2d 236, §4 (1952 & Later Case Service [1970 & 1978 Supp.]).



## III

We assume, then, that under ordinary circumstances, plaintiff tolled the running of the statute of limitations by filing her complaint in the Southern District on December 28, 1976, shortly before the end of the applicable two year period. Appellant, however, stresses that the circumstances here were not ordinary, and claims that when a plaintiff has named the wrong defendant and the statute of limitations has run, plaintiff may not amend the complaint and the action is barred. Appellant also argues that in any event, the delay in serving the right defendant required dismissal under Rule 41(b) for failure to prosecute. Plaintiff responds that the inaccuracy in the complaint was a mere "misnomer" so that amendment under Rule 15(c) was entirely proper and that she used due diligence in serving the proper defendant.

Whether a "new" party may be added by amendment under Rule 15 after the statute of limitations has run is a subject on which much ink has been spilled by courts and commentators. Prior to 1966, courts had reached apparently inconsistent, and in some instances, seemingly harsh conclusions on similar fact patterns. See cases collected in 6 Wright & Miller, Federal Practice and Procedure §1498, at 506 nn. 83-84 (1971 & 1977 Supp.) and 3 Moore's Federal Practice ¶¶ 15.15 [4.-1] to [4.-2] (1974 & 1977-78 Supp.). Rule 15(c) was amended in 1966 in an attempt to establish criteria that would lead to more uniform and equitable results. See Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 407-10 (1967). Rule 15(c) now provides, in pertinent part,

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be

> set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The first sentence of subsection (c) was unchanged by the amendment, and there is no doubt that the requirements of the first sentence were met here. The issue remains as to the requirements of the second sentence, which was added in 1966.[8]

Appellant makes much of the coincidence that there actually were two Dr. Kumars, one of whom plaintiff attempted to serve shortly after the complaint was filed. From this, appellant argues that plaintiff intended to sue the wrong Dr. Kumar. Plaintiff rejoins that she obviously always meant to sue the Dr. Kumar who had treated her husband in Illinois, and that the minor mistake in spelling defendant's name was merely a "misnomer." Although plaintiff clearly has the better of this

[8]We have no problem in finding that Fed.R.Civ.Proc. 15(c) applies in federal courts notwithstanding a possibly more restrictive state practice. Strong federal policies underlie Rule 15(c). See, e.g., 6 Wright & Miller, *supra*, §1503 at 535. Application of the federal standards for relation back will not significantly impair state interests or encourage forum shopping. *Id.* Other circuits also have reached this conclusion. See, e.g., *Skidmore* v. *Syntex Laboratories, Inc.*, 529 F.2d 1244, 1249 (5th Cir. 1976); *Loudenslager* v. *Teeple*, 466 F.2d 249, 250 (3d Cir. 1972); *Crowder* v. *Gordon Transports, Inc.*, 387 F.2d 413, 415-17 (8th Cir. 1967).



argument, we do not regard it as controlling, unless "misnomers" need not satisfy the criteria of the second sentence of Rule 15(c).

Some courts have held that mere "misnomers" can be corrected under the first sentence of subsection (c) and need not meet the requirements set forth in the second sentence for "changing the party." See, e. g., *Washington v. T. G. & Y. Stores Co.*, 324 F. Supp. 849, 856 (W. D. La. 1971); *Wentz v. Alberto Culver Co.*, 294 F. Supp. 1327, 1328-29 (D. Mont. 1969); *Fricks v. Louisville & Nashville, R.R. Co.*, 46 F.R.D. 31, 32 (N. D. Ga. 1968). See also 6 Wright & Miller, *supra*, §1498 at 513-14; *Armijo v. Welmaker*, 58 F.R.D. 553 (D. Ariz. 1973) (allowing correction of misnomer under Rule 15[a]). Such an interpretation is attractive in a case such as this where the equities lie with plaintiff and the language of the Rule poses a problem, as will be seen below. But the history of the 1966 amendment to the Rule indicates to the contrary,[8] as does the weight of authority.[7] Moreover, such a distinction is not helpful in some situations. When, as here, the mistaken complaint names an actual

[8]The Advisory Committee's Note to Rule 15(c), 39 F.R.D. 82 (1966) states: "Rule 15(c) is amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted *(including an amendment to correct a misnomer or misdescription of a defendant)* shall 'relate back' to the date of the original pleading." (Emphasis added.)

[7]In most situations courts simply assume that the second sentence of Rule 15(c) applies to misnomer amendments without discussing whether this is necessary. See, e.g., *Travelers Indemnity Co.* v. *United States ex rel. Constr. Specialties Co.*, 382 F.2d 103 (10th Cir. 1967); *Wynne* v. *United States ex rel. Midstates Waterproofing Co.*, 382 F.2d 699 (10th Cir. 1967); *Horwitt* v. *Longines Wittnauer Watch Co.*, 388 F. Supp. 1257, 1258-59 (S.D.N.Y. 1975); *Mitchell* v. *Hendricks*, 68 F.R.D. 564, 566 (E.D. Pa. 1975); *Davis Water & Waste Industries* v. *Jim Wilson, Inc.*, 67 F.R.D. 509 (E.D. Tenn. 1974); *Brittian* v. *Belk Gallant Co.*, 301 F. Supp. 478 (N.D. Ga. 1969).

person or entity in existence, it is not obvious whether the amendment corrects a "misnomer" or brings in a truly "new" party. Analysis of "relation back" under these circumstances is better accomplished through application of the specific guidelines in the second sentence of Rule 15, than by attempting to draw an arbitrary line between misnomers and changes of party. Thus, we conclude that an amendment merely correcting a "misnomer" is nonetheless one "changing the party against whom a claim is asserted."

In most "misnomer" cases, however, "the party to be brought in" by the amendment already knows before the amendment about plaintiff's claim and that plaintiff actually intended to assert it against him. For example, the plaintiff names a corporation in the complaint instead of a partnership and serves a partner, or incorrectly spells, in a minor detail, the name of a defendant who is served. See, e. g., *Boatman v. Thomas,* 320 F. Supp. 1079 (M. D. Pa. 1971); *Dunnan v. Innerst,* 50 F.R.D. 372 (M. D. Pa. 1970). In such cases, the amendment should clearly be allowed under Rule 15(c). See, e. g., cases cited in 6 Wright & Miller, *supra,* §1498 at 513 n. 99, §1499 at 516 n. 14, 518-20 nn. 17-21 (1971 & 1977 Supp.). In this case, however, the intended Dr. Kumar knew nothing of the attempted service upon the wrong Dr. Kumar, and did not get notice until he was served in May 1976, several months after the statute of limitations had run. The crucial question, therefore, is whether "within the period provided by law for commencing the action against him" defendant

> (1) . . . received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.



We believe that the requirements of the Rule were met.

Although on its face the phrase, "within the period provided by law for commencing the action against him," seems to mean the applicable statute of limitations period, such a literal interpretation is unjustified in jurisdictions where timely service of process can be effected after the statute of limitations has run.[8] In those jurisdictions, even an accurately named defendant may not receive actual notice of the action against him prior to the running of the statute of limitations. Yet there is no doubt that the action against him is timely commenced. There is no reason why a misnamed defendant is entitled to earlier notice than he would have received had the complaint named him correctly. Calling the problem raised here a "curious but minor difficulty of interpretation . . . over the language of the rule referring to the limitations period," Professor (now Justice) Benjamin Kaplan, reporter for the Advisory Committee on Civil Rules, implicitly criticized a district court decision refusing relation back on facts somewhat similar to these. Kaplan,

---

[8] This problem is not limited to circuits where the *Sylvestri* rule for diversity cases has been adopted. Even circuits which have held that state law governs commencement of the action in diversity cases will often face the problem since many states follow the approach of Fed.R.Civ.Proc. 3, see note 4 *supra,* and, in any event, the federal rule governs actions based on federal law. See, e.g., *Metropolitan Paving Co.* v. *Internat'l Union of Operating Engineers,* 439 F.2d 300, 306 (10th Cir.), cert. denied, 404 U.S. 829 (1971); *Jackson* v. *Duke,* 259 F.2d 3, 6 (5th Cir. 1958); 2 Moore's Federal Practice, *supra,* note 3, ¶3.07 [4. -3-2] at 3-113 to 3-116.

*supra*, at 410 & n. 204.[9] Professor Kaplan noted the anomaly of dismissing an action, which "against the original defendant . . . would be considered timely brought despite the delayed service." *Id.* at 410 n. 204.

We agree that such a result is anomalous and that it is not required by Rule 15(c).[10] This case presents an excellent situation for specific application of the Rule's general admonition that "leave [to amend] shall be freely given when justice so requires." Fed.R.Civ.Proc. 15(a). If plaintiff's action would have been timely had her complaint correctly named Vijay S. Kumar, even though he had no notice until four months after expiration of the limitations period, then we think the minor misspelling of defendant's name should not alter this result. We hold that under Rule 15(c) the period within which "the party to be brought in" must receive notice of the action includes the reasonable time allowed under the federal rules for service of process.[11] We think this interpretation is permissible and desirable and carries out the beneficent purpose of the 1966 amendment.[12]

[9]The case discussed by Professor Kaplan was *Martz* v. *Miller Bros. Co.*, 244 F. Supp. 246 (D. Del. 1965). There the plaintiff filed an action against Miller Brothers Company before expiration of the limitations period, but did not serve process until three days after the running of the limitations period. Shortly thereafter, it was discovered that the proper defendant was Miller Bros. Co. "of Newark," a separate but affiliated firm. Although the court assumed that service upon Miller Brothers Company after the statute of limitations had run was nevertheless timely, the court did not allow relation back of the amendment correcting the defendant's name because it did not have notice of the action prior to the running of the statute. However, the court questioned "whether this inconsistency . . . would not frequently defeat the purpose which the [amendment to the rule] was designed to serve," and suggested that the then proposed amendment be changed to extend the notice period to include the time allowed for service of process. 244 F. Supp. at 254 n. 21.

[10]In this context, we respectfully disagree with *Archuleta* v. *Duffy's Inc.*, 471 F.2d 33 (10th Cir. 1973) and *Simmons* v. *Fenton*, 480 F.2d 133 (7th Cir. 1973), the decisions principally relied on by defendant.

[11]For a thorough discussion of this issue, see generally, Note, Federal Rule of Civil Procedure 15(c): Relation Back of Amendments, 57 Minn. L. Rev. 83 (1972).



The key issue then is whether, had there been no attempt to serve the incorrect Dr. Kumar, service on the intended Dr. Kumar on May 6 would still have been timely under the federal rules governing service of process. If so, then the intended Dr. Kumar received notice "within the period provided by law for commencing the action against him." On the question whether plaintiff delayed so long in serving defendant that the latter's motion under Rule 41(b) had to be granted, Judge Curtin observed:

> Although failure to serve the defendant within a reasonable time may, under some circumstances, constitute want of prosecution, *Messenger v. United States*, 231 F.2d 328 (2d Cir. 1956), as a practical matter prompt service cannot always be achieved. In this case, service was delayed because of an error in the caption adding an "A" to the defendant's first name, and substituting an "N" for an "S" as the defendant's middle initial. The error occurred because the defendant's highly unusual name, Vijay S. Kumar, was not listed in the New York State Medical Directory and a similar name, Vijaya N. Kumar, was. The plaintiff's attorney assumed that the Dr. V. Kumar found listed in the Directory was the same Dr. V. Kumar who had treated the decedent. Although perhaps he

[12]We can find no case in which we have squarely considered this construction of Rule 15(c). In *Evans* v. *United States Veterans Administration Hospital*, 391 F.2d 261 (2d Cir. 1968), cert. denied, 393 U.S. 1040 (1969), plaintiff sued a Veterans Administration hospital, but delayed over three and one-half years before attempting to serve process, clearly an unreasonable period. Plaintiff was not permitted to add the United States as a party because the United States had received no notice of the action within the applicable two-year statute of limitations.

could have gone to greater lengths to verify the spelling of the doctor's name, his assumption was not unreasonable. Once the error was discovered, the correct defendant was located and served. Although the lapse of several months between the time the error was discovered and the time the defendant was served has not been fully explained by the plaintiff, this delay in service was not so unreasonable as to justify dismissal of the claim.[1]

[1]At the same time that the defendant faults the plaintiff for misspelling his name, the defendant in his reply memorandum of law lists the defendant as Vijaya N. Kuman. The court cannot resist the opportunity to comment on the irony of this situation.

We need add little to these observations. More recent authority confirms that dismissal under Rule 41(b) is discretionary for the district court, see, e. g., *Finley v. Parvin Dohrmann Co.*, 520 F.2d 386, 390-92 (2d Cir. 1975); *Joseph Muller Corporation Zurich v. Societe Anonyme De Gerance Et D'Armament*, 508 F.2d 814, 815-16 (2d Cir. 1974). And Judge Curtin's exercise of discretion here was clearly not unreasonable.[13] We believe that defendant, therefore, did receive notice of plaintiff's claim "within the period provided by law for commencing the action against him," that the judge could properly hold that plaintiff's amendment did "relate back" under Rule 15(c), and that the statute of limitations did not bar the action.

Accordingly, we affirm the judgment of the district court.

[13]Since the Rules do not specify a time period within which process must be served, courts have based decisions on timeliness of service under Rules 4(a) and 41(b) on whether plaintiff acted diligently to obtain service of process and whether the delay prejudiced the defendant. Delays of a few months generally have been excused where, as here, the evidence showed a valid reason for the delay and that plaintiff was not engaging in dilatory tactics. See, e.g., *H. Alpers & Assocs. v. Omega Precision Hand Tools, Inc.*, 62 F.R.D. 408, 411-12 (1974); 4 Wright & Miller, Federal Practice and Procedure, §1086 (1969).



## APPENDIX B.

### Opinion of the District Court.

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF NEW YORK.

REBERTA INGRAM, as Administratrix of the goods, chattels and credits which were of Walter Ingram, Deceased, and REBERTA INGRAM, individually,

*Plaintiff,*

*vs.*

VIJAYA N. KUMAR,

*Defendant.*

Civ-77-281

Appearances:

Julien & Schlesinger, P.C. (David Jaroslawicz, of Counsel), New York, New York, for Plaintiff.

Bower & Gardner (Barbara P. Billauer, Esq., of Counsel), New York, New York, for Defendant.

This case presents a law professor's dream. The plaintiff alleges that the defendant, a neurosurgeon, negligently treated the plaintiff's decedent in January of 1975 while practicing medicine in an Illinois hospital. Sometime after January 1975, the defendant moved to New York State. In attempting to locate the defendant for purposes of this lawsuit, the plaintiff's attorney examined the New York State Medical Directory and found Vijaya N. Kumar listed as a doctor residing in Valhalla, New

York. Assuming that the listed individual was the same Dr. Kumar who had treated the decedent in Illinois, the plaintiff commenced an action against Vijaya N. Kumar in the Southern District of New York. The summons and complaint were filed in federal court on December 28, 1976, alleging diversity of citizenship as the basis of jurisdiction.

When service was attempted, Dr. Vijaya N. Kumar informed the process server that there apparently had been some mistake because he had not treated the plaintiff in Illinois. The plaintiff then located the correct defendant, Vijay S. Kumar, in Jamestown, New York, and had him served there on May 6, 1977. The defendant answered, alleging the two-year Illinois statute of limitations as an affirmative defense. Since Jamestown is within the Western District of New York, the case was transferred to this district.

The defendant now moves for summary judgment based on the statute of limitations and for dismissal for failure to prosecute. The defendant contends that he was not served within the applicable statute of limitations and that therefore the action is absolutely barred. Although the complaint was filed in federal court within two years of the alleged malpractice, the defendant argues that the filing tolled the statute of limitations only as to the named defendant, Vijaya N. Kumar, and not as to the proper defendant, Vijay S. Kumar. He opposes amending the complaint on the ground that the defendant never received notice of the pendency of the action within the limitations period. Finally, he argues that the plaintiff's failure to identify and locate Vijay S. Kumar within the statutory period justifies dismissal of the action for failure to prosecute.

The plaintiff in response has moved to strike the statute of limitations defense and to amend the caption of the pleadings to reflect the proper spelling of the defendant's name. He takes the position that the statute of limitations was tolled when the complaint was filed in federal court and that he now seeks merely to correct a minor error in the spelling of the defendant's name. He also points out that the defendant was not misled by the error and has not alleged any prejudice other than being called upon to defend the malpractice action.



The court has carefully considered the papers submitted by the parties and the oral arguments of counsel. For the reasons stated below, the defendant's motion is denied, and leave to amend the caption of the pleadings is granted to the plaintiff.

As to the claim that the plaintiff failed to exercise due diligence in identifying and serving the defendant, the court refuses to exercise its discretion under Rule 41(b) of the Federal Rules of Civil Procedure to dismiss for failure to prosecute. Although failure to serve the defendant within a reasonable time may, under some circumstances, constitute want of prosecution, *Messenger v. United States,* 231 F.2d 328 (2d Cir. 1956), as a practical matter prompt service cannot always be achieved. In this case, service was delayed because of an error in the caption adding an "A" to the defendant's first name, and substituting an "N" for an "S" as the defendant's middle initial. The error occurred because the defendant's highly unusual name, Vijay S. Kumar, was not listed in the New York State Medical Directory and a similar name, Vijaya N. Kumar, was. The plaintiff's attorney assumed that the Dr. V. Kumar found listed in the Directory was the same Dr. V. Kumar who had treated the decedent. Although perhaps he could have gone to greater lengths to verify the spelling of the doctor's name, his assumption was not unreasonable. Once the error was discovered, the correct defendant was located and served. Although the lapse of several months between the time the error was discovered and the time

the defendant was served has not been fully explained by the plaintiff, this delay in service was not so unreasonable as to justify dismissal of the claim.[1]

The questions raised by the statute of limitations defense and the motion to amend are closely related: both turn on a characterization of the nature of the error made by the plaintiff. Whereas the plaintiff views the error merely as a misnomer, the defendant argues that it is one of mistaken identity, constituting a jurisdictional defect.

Turning first to the question of amending the complaint, two federal rules are relevant. Rule 4(h) provides as follows:

> At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

Rule 15(c), setting forth the circumstances under which amendments relate back, provides a pertinent part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

[1]At the same time that the defendant faults the plaintiff for misspelling his name, the defendant in his reply memorandum of law lists the defendant as Vijaya N. Kuman. The court cannot resist the opportunity to comment on the irony of this situation.



The cases under Rules 4 and 15(c) distinguish between amendments bringing new parties into the lawsuit and amendments correcting misnomers. In the latter situation but not the former, amendments are allowed after the statute of limitations has run. 2 Moore's Federal Practice ¶ 4.44, at 1295.52-1295.55 (2d ed. 1948); 3 *supra* ¶ 15.15 (4.-1), at 1039-1042.

The test for distinguishing between the two types of amendments is formulated by Moore as follows:

> The test should be whether, on the basis of an objective standard, it is reasonable to conclude that the plaintiff had in mind a particular entity or person, merely made a mistake as to the name, and actually served the entity or person intended; or whether plaintiff actually meant to serve and sue a different person. And this test should apply though the amendment is sought after the statute of limitations has run as to the person or entity misnamed in the process.
>
> 2 *supra* ¶ 4.44, at 1295.52-1295.53.

Although the question in this case is a close one, the plaintiff's motion to amend seems to be more accurately characterized as one to correct a misnomer than as one to substitute parties. This is not a case where a plaintiff is attempting to introduce a totally new party to the lawsuit after the statute of limitations has run. There is no doubt that the plaintiff had at all times intended to sue and serve the neurologist who had treated the decedent in Illinois in 1975. This intent was clear from the face

of the complaint. The court was aware of the real party intended, and the defendant admits that he was not misled by the error. The proper defendant was actually served, and his attorney promptly appeared with full knowledge that Vijay S. Kumar was the proper defendant.

Since the error qualifies as a misnomer under Moore's test, the amendment requested by the plaintiff relates back to the date on which the complaint was filed. It is well established in the Second Circuit that the statute of limitations is tolled at the time of filing the complaint in federal court rather than the time of service. *Sylvestri v. Warner & Swasey Co.*, 398 F.2d 598 (2d Cir. 1968). Since the plaintiff's complaint was filed within the two-year period, the action is not barred by the statute of limitations, even though service was not made on the defendant within two years of the alleged malpractice.

Under Rule 15(a), leave to amend the pleadings "shall be freely given when justice so requires." In this case, the court finds that leave should be granted. The defendant has failed to show that he will be unduly prejudiced if the plaintiff's motion is granted. The plaintiff's error was both minor and understandable. Accordingly, the defendant's motion is denied and the plaintiff is granted leave to amend the caption.

So ordered.

Dated: October 31, 1977

JOHN T. CURTIN
United States District Judge

78-1095

Supreme Court, U.S.
FILED
FEB 7 1979
MICHAEL RODAK, JR., CLERK

In The

# Supreme Court of the United States

October Term, 1978

No.

VIJAY S. KUMAR,

*Petitioner,*

-against-

REBERTA INGRAM, as Administratrix of the goods, chattels and credits which were of Walter Ingram, deceased, and REBERTA INGRAM, individually,

*Respondent.*

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

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IN THE

SUPREME COURT OF THE UNITED STATES

VIJAY S. KUMAR,

Petitioner,

- against -

REBERTA INGRAM, as Administratrix of the goods, chattels and credits which were of Walter Ingram, deceased, and REBERTA INGRAM, individually,

Respondent.

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

---

## INTRODUCTORY STATEMENT

The respondent is submitting this brief in opposition to the petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit on the grounds that there are no issues requiring determination by this Court and the petitioner's statement of the facts is misleading.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 585 F.2d 566 (2d Cir 1978). The memorandum decision of the United States District Court for the Western District of New York (Appendix B of the petition) is not reported.

## QUESTIONS PRESENTED

1. Where an action is timely filed prior to the expiration of the Statute of Limitations,



but the plaintiff misspells the defendant's name as Vijaya N. Kumar, rather than "Vijay S. Kumar", and service is effected upon the proper defendant within a reasonable period of time, does the mere adding of an "a" to the defendant's first name and the substitution of a different middle initial require that the plaintiff's action be dismissed?

2. Where an action has been properly and timely filed, and the parties know that the defendant intended is Vijay S. Kumar and the defendant's first name and middle initial have been misspelled as Vijaya N. Kumar, rather than Vijay S. Kumar, does this require that the plaintiff's action must be dismissed and that the action has not been timely commenced against Vijay S. Kumar because of the misspelling of the defendant's first name and middle initial?

3. Where the plaintiff in good faith

relied upon the Second Circuit's decision in Sylvestri v. Warner & Swasey Co., 398 F.2d 598 (2d Cir. 1968) -- that filing of the summons and complaint was sufficient to toll the statute of limitations and that actual service is not required -- would it be just and equitable to dismiss the plaintiff's claim in this action even if the Court were to rule that in the future in a state where actual service is required, mere filing of the summons and complaint is insufficient and actual service would have to be made in order for the statute of limitations to be tolled?

## STATUTES AND RULES INVOLVED

In addition to Rules 3 and 15 of the Federal Rules of Civil Procedure, contained in the petition, the respondent believes that



Rule 4(h) of the Federal Rules of Civil Procedure, should likewise be considered by the Court.

Federal Rules of Civil Procedure

Rule 4(h) Amendment.

> "At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued."

New York Civil Practice Law and Rules

Section 1024. Unknown parties.

> "A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly."

## STATEMENT OF THE CASE

The defendant in this action is a physician who while practicing medicine in the State of Illinois during the period between January 6 - 15, 1975, treated the decedent Walter Ingram. The complaint alleges that the defendant treated the decedent negligently so as to cause his wrongful death.

Sometime after January 1975 the defendant apparently left the State of Illinois and moved to the State of New York.

On December 28, 1976, the plaintiff, as Administratrix of the decedent's Estate commenced an action in the United States District Court for the Southern District of New York by filing a summons and complaint with the Clerk of the Court pursuant to Rule 3 of the Federal Rules of Civil Procedure.



In filing the summons and complaint, the plaintiff misspelled the defendant's name as "Vijaya N. Kumar" rather than "Vijay S. Kumar". Plaintiff's counsel had consulted the New York State Medical Directory and found the name of Vijaya N. Kumar, and thus, was led to believe that this was the proper spelling of the defendant's name.

In an attempt to expedite service, plaintiff's counsel had a special process server appointed. Plaintiff's special process server proceeded to the address found for Kumar in the medical directory, but when it was revealed that there were in fact two Kumar's and the address in the medical directory referred to Vijaya N. Kumar and not to the defendant Vijay S. Kumar, plaintiff's counsel then ascertained the defendant Vijay S. Kumar's address in Jamestown, New York and had a second special process server appointed to

serve the defendant in Jamestown.

The defendant was admittedly properly served with a summons and complaint on May 6, 1977. On May 23, 1977, counsel for the defendant Kumar made a motion to dismiss this action on the ground that the venue was improper since the defendant was a resident of the Western District of New York, and not the Southern District of New York. This initial motion by defense counsel made it clear that they were fully aware that the defendant Vijay S. Kumar was the party intended to be sued by the plaintiff and there had simply been a misspelling of the defendant's name. In their notice of motion to dismiss for improper venue, counsel for the defendant designated themselves as attorneys for "Vijay S. Kumar s/h/a Vijaya N. Kumar", clearly indicating that they considered the defendant's name to have been misspelled and



admittedly knew that the defendant Vijay S. Kumar was the party against whom this action was directed.

The Southern District of New York denied the defendant's motion to dismiss for improper venue, but transferred this action to the Western District of New York.

On or about July 11, 1977 the defendant filed an answer admitting jurisdiction and raising no affirmative defenses and then on or about July 13, 1977 filed an amended answer for the first time alleging the statute of limitations as a purported defense. Both the answer and amended answer indicate that counsel for the defendant were fully aware that the action was directed at Vijay S. Kumar and they continuously referred to the defendant as "Vijay S. Kumar s/h/a Vijaya N. Kumar."

The defendant then brought on a motion to

dismiss in that the plaintiff had failed to diligently prosecute this action because service had not been effectuated upon the defendant until May 7, 1977 and that the date of service upon the defendant was more than two years from the last date that the defendant had treated the decedent and the action was thus allegedly barred by the Illinois statute of limitations.

The defendant was compelled to admit that pursuant to Rule 3 of the Federal Rules of Civil Procedure an action is deemed commenced when filed and that this action was admittedly filed on December 28, 1976, well within the two-year period from the defendant's last treatment of the decedent. The defendant, however, took the position that the action had only been commenced as against Vijaya N. Kumar and not against the defendant Vijay S. Kumar because the defendant's name had been misspelled



on the summons and complaint. In addition, the defendant argued that since under New York State Law a defendant must be served with the summons in order to toll the statute of limitations and not simply filed that the federal court must likewise follow this procedural method and that since the defendant was not served until more than two years after his last treatment of the decedent, his action was time barred.

The plaintiff brought on a cross-motion to correct the spelling of the defendant's name in the caption.

The District Court Judge denied the defendant's motion to dismiss and granted the plaintiff's motion to correct the spelling of the defendant's name in the caption, as provided in Rule 4(h) of the Federal Rules of Civil Procedure.

On Appeal to the United States Court of Appeals for the Second Circuit, the Second Circuit, in a well reasoned decision, affirmed the order of the District Court (See Appendix A annexed to the petition).

THE REASONS FOR NOT GRANTING THE WRIT

1. The contention that the Court below in refusing to dismiss the plaintiff's complaint as being time barred because there had been a minor misspelling of the defendant's first name and the substitution of a different middle initial had in effect permitted the addition of a new party after the statute of limitations has run, is shear sophistry, and the decision of the Court below is not in conflict with the decisions of other Circuits.

The petitioner, on page 7 of his petition, claims that

> "The Second Circuit correctly found that this case did not fit within the category of a 'mere misnomer,' and concluded that it must be treated as an amendment 'changing the party against whom a claim is asserted.'"



This is an obvious misstatement of what was in fact said by the Second Circuit, and deliberately misleading.

The Second Circuit did not say that the case now before the Court involved anything more than a mere misnomer. What the Second Circuit said is:

> "Thus, we conclude that an amendment merely correcting a 'misnomer' is nonetheless one 'changing the party against whom a claim is asserted.'"

The Second Circuit carefully pointed out that under the law in Illinois, where this action could have been commenced, and the law of various other states, filing of the summons with the Court is sufficient to toll the statute of limitations. See Ill. Ann Stat. ch. 110, §13; ch. 70, §2 (Smith-Hurd); 27 A.L.R.2d 236, §4.

There is thus no prejudice to the defendant if this action was commenced in New York

and the District Court applies Rule 3 of the Federal Rules of Civil Procedure, which provides that a Civil action is commenced by the filing of the complaint.

The Second Circuit also pointed out that the defendant in this case would have had the exact same notice of this action if his first name would have been spelled as "Vijay" rather than "Vijaya", and his middle initial had been set forth as "S" rather than "N".

The Second Circuit stated:

> "There is no reason why a misnamed defendant is entitled to earlier notice than he would have received had the complaint named him correctly." 585 F.2d at 571.*

*It should be called to the Court's attention that under New York CPLR 1024, which provides that "A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes



Or, as the Second Circuit further stated:

> "If plaintiff's action would have been timely had her complaint correctly named Vijay S. Kumar, even though he had no notice until four months after expiration of the limitations period, then we think the minor misspelling of defendant's name should not alter this result." 585 F.2d at 571

The Second Circuit also pointed out the irony and lack of merit to the defendant's contention that the complaint should be dismissed for a misspelling and wrong initial, when the defendant himself had misspelled his own name in numerous ways in papers submitted to the District Court (585 F.2d at 572).

known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly." It would have been perfectly proper for the plaintiff to have commenced her action against the defendant under the designation V. Kumar. Plaintiff should not be penalized for having attempted to designate the defendant more completely, and in doing so, misspelled his uncommon first name, and substituted an "N" for an "S" as his middle initial.

The two cases relied upon by the defendant as allegedly creating conflict among the Circuits which require certiorari to be granted so that the conflict may be resolved by this Court do not create any real conflict, but only the apparent conflict created by petitioner's counsel. The two cases in question are Simmons v. Fenton, 480 F.2d 133 (7th Cir. 1973); and Archuleta v. Duffy's Inc., 471 F.2d 33, (10th Cir. 1973).

An analysis of those two cases, however, indicates that they are not in conflict with the Second Circuit's decision in this case. In Simmons, the plaintiff attempted to do more than correct a mistake in the spelling of a defendant's name.

In Simmons, the proper party defendant had not been served, and more than a year after the statute of limitations had run, the plaintiff



attempted to substitute a different party as a defendant, and deemed the summons served as to him. The Court refused to allow this amendment and stated:

> "Further, since Doris J. Fenton is not now before the Court and, in fact, has never yet been served with process, there is clearly prejudice to her if the amendment is allowed." 480 F.2d at 136.

In our case, the appropriate defendant had been served and in a timely fashion as was found by the District Court. The only defect was the misspelling in his first name and middle initial.

The other case relied upon by the defendant as creating an apparent conflict is Archuleta v. Duffy's Inc., supra. In that case, the plaintiff named as a defendant Denver Pop Company, a Colorado corporation, formerly known as and d/b/a Duffy's Inc. The true defendant was Duffy's Inc. In a 2 to 1 decision,

with a vigorous dissent, the Court found that in an equal employment opportunity case, the rules were to be strictly construed and would not permit an amendment to name Duffy's Inc. as a proper defendant after the Statute had run. Archuleta, however, should be limited to its facts. The Tenth Circuit's position on amending a compliant to correct a misnomer, is set forth in Wynne v. United States, 382 F.2d 699 (10th Cir. 1967), and that Court's decision is clearly the same as the position taken by the Second Circuit in this case. There is thus no real conflict between the Circuits with regard to correcting the misnomer, and the rule is that as set forth by Moore, in his treatise, where he states at paragraph 4.44:

> "The test should be whether, on the basis of an objective standard, it is reasonable to conclude that the plaintiff had in mind a particular entity or person, merely a mistake as to the name, and actually served the entity or person intended; or whether plaintiff actually



> meant to serve and sue a different person. And this test should apply though the amendment is sought after the statute of limitations has run as to the person or entity misnamed in the process."

See also Wright and Miller in their Treatise on Federal Practice, which provides:

> "The most common occasion for amendment is when plaintiff has made a simple mistake or a technical error that results in a failure to identify defendant properly, such as when a corporation is not denominated by its registered name or defendant's name is misspelled. When the error goes to form rather than substance, as these defects obviously do, and the proper defendant receives the original process, realizes it is directed at him, and thus is put on notice of the commencement of the action, there is no reason why a federal court should refuse to permit amendment." at 4 Federal Practice and Procedure §1131.

And as the Fourth Circuit eloquently stated in United States v. A.H. Fischer, 162 F.2d 872 (4th Cir. 1947):

> "A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it

names them in such terms that every intelligent person understands who is meant, as is the case here, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else."

There is thus no real conflict among the Circuits and no reason to grant certiorari.

2. The question of whether the tolling of the statute of limitations takes place upon the filing of the summons and complaint with the Court or upon service does not require this Court to grant certiorari in the case now before it.

The Second Circuit in confirming the decision of the Court below reaffirmed its decision in Sylvestri v. Warner & Swasey Co., 398 F.2d 598 (2nd Cir. 1968), that pursuant to the clear language of Rule 3 of the Federal Rules of Civil Procedure, an action in the Federal Court is deemed commenced when filed, for the purpose of tolling the applicable State Statute of Limitations, and does not require actual service.



The Second Circuit made it clear that it was not confirming the decision in this case because it was bound by Sylvestri, but that:

"Moreover, our acceptance of its binding force is not grudging; we think the decision was correct for the reasons there given." 585 F.2d at 568.

The Second Circuit realized that other Circuits have taken a different position on this question. See Witherow v. Firestone Tire & Rubber Co., 530 F.2d 160, 166 n. 8 (3d Cir. 1976) and Anderson v. Papillion, 445 F.2d 841 (5th Cir. 1971) with Smith v. Peters, 482 F.2d 799 (6th Cir. 1973), cert. denied, 415 U.S. 989 (1974) and Chappell v. Rouch, 448 F.2d 446 (10th Cir. 1971).

Respondent's counsel submits that this case does not require this Court to decide the question of when the Statute of Limitations is tolled when a claim based on diversity of

jurisdiction is filed in the Federal Courts since there is no real issue in this case. The defendant in this case admits that the defendant could have been served in the State of Illinois (page 3, Petitioner's Brief) and in the State of Illinois, the statute of limitations is tolled upon filing, rather than service. See Ill. Ann. Stat. ch. 110, §13; ch. 70, §2 (Smith-Hurd).

Thus, although an issue might be presented in another case where if the action were commenced in the defendant's home state, service was required to toll the statute of limitations rather than mere filing, that issue does not exist in this case, and there is no reason for the Court to grant certiorari.

## CONCLUSION

The petition for certiorari should be denied as there being no issues to be reviewed



by this Court, and the well reasoned decision of the United States Court of Appeals for the Second Circuit should not be disturbed.

Dated: January 23, 1979

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